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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3.	Investigation 12-10-013 (Filed October 25, 2012)
And Related Matters.	Application 13-01-016 Application 13-03-005 Application 13-03-013 Application 13-03-014

RUTH HENRICKS' AND THE COALITION TO DECOMMISSION SAN ONOFRE'S (CDSO) MOTION TO STAY COLLECTION OF RATES BASED ON SAN ONOFRE REVENUE REQUIREMENTS

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[1] Coalition to Decommission San Onofre is a fictitious business name of Citizens Oversight, Inc.

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I.

SUMMARY

The California Public Utility Commission (CPUC) must issue a stay of collection of rates from utility customers based on revenue requirements for the closed San Onofre nuclear power plant. The plant has not been used or useful to utility customers since January 2012. There can be no more profiteering from this plant; any further costs imposed on ratepayers related to the plant must be limited to decommission aspects only

Southern California Edison (SCE) admittedly deployed 4 defective new steam generators integral to the safe and reliable operation of the plant. In SCE's words, "all four RSGs had experienced multiple types of extreme vibration and wear, causing

damage at an unprecedented pace and severity." Again, SCE admitted it installed defective steam generators. But SCE claimed it was defrauded into doing so by the project contractor Mitsubishi Heavy Industries (MHI).

The issue of whether SCE was telling the truth in its claim that it was a fraud victim was litigated before an international arbitration Tribunal. One week ago, 9 June 2017, the decision finding SCE was **not** defrauded was released to the public. The arbitration Tribunal "rejected each of [SCE's] claims of alleged fraudulent inducement, misrepresentation (negligent or otherwise), intentional fraud and tortious liability..." (Arbitration Decision, p. 908, ¶ 2517)

In contrast, the CPUC not only accepted SCE's fraud victim claim, but also relied on SCE's "multi-billion arbitration claim" against MHI in its Decision. The CPUC's decision even provided a formula to continue to collect rates based on San Onofre revenue requirement for the defunct plant relating to how proceeds from SCE arbitration would be divided:

> After deducting litigation costs, as modified, the ratepayers and shareholders will share 50%/50% in all recovery from the pending **multi-billion arbitration claim** by the Utilities against Mitsubishi. (D.14.11040, p. 6)

As set forth below, pursuant to Rule 11.1 of the California Public Utilities Commission's (CPUC) Rules of Practice and Procedure, Ruth Henricks and the Coalition to Decommission San Onofre submit this Motion to Stay Collection of Rates from Utility Customers Based on Revenue Requirements for the Closed San Failed Plant; no further Advice Letters, or other mechanisms seeking revenue requirement from San Onofre, should be permitted.

Despite the facts revealed that caused a closed proceeding to be reopened, collection of revenue requirement from rates continues. The recent arbitration tribunal's decision reflects SCE's admissions that its decisions to proceed with the design were taken in spite of what was then known by SCE. Accordingly, allowing further years of

collection until a decision is made as to the propriety of charging ratepayers is patently unreasonable.

The CPUC must issue a stay of Decision D.14.11040 so that SCE, in the future, cannot use San Onofre to calculate SCE's revenue requirements. See, 1985 Cal. PUC LEXIS 1089, *2; 1991 Cal. PUC LEXIS 133, *2; 1984 Cal. PUC LEXIS 615, *2. SCE's business-as-usual use of D.14.11040 to set a San Onofre revenue requirement is unwarranted in light of SCE's failure to support SCE's frivolous arbitration fraud claim with any credible evidence. The stay will restore a balanced equity between SCE and utility customers essential for a fair agreed-to resolution of the case.

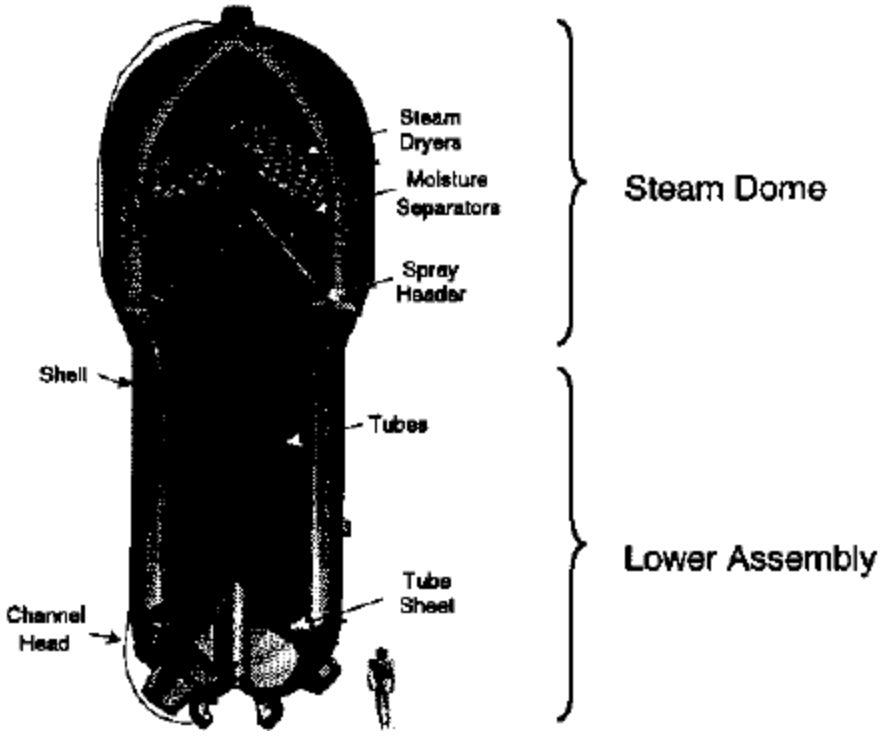
According to SCE, during the period between February 1, 2012 and December 31, 2016, SCE recovered approximately $873 million from customers for San Onofre, or 50.4% of the original $1.733 billion balance. (Advice Letter 3499-E, p.4) SCE estimated the 2017 San Onofre revenue requirement at $236.9 million. Specifically, this motion requests the CPUC stay the filing or approval of any more SCE Advice Letters aimed at SCE recovering any more revenue requirements for San Onofre.

II.

NEW STEAM GENERATORS

Good faith requires the utility to see it was its irreconcilable design demands for the new steam generators and its decision to limit correctives to those within an NRC safety exemption known as CFR 50.59 that caused the new steam generators to fail, the radioactive leak to occur, and the plant to close.

On 17 July 2003, utility management presented this slide and told the utility's board of directors the continued nuclear plant operation with existing steam generators "becomes significantly uncertain beyond about 2009" because the plant's steam generators alloy tubes were cracking:



At the July 2010 Proceedings of the ASME 2010 Pressure Vessels & Piping Division Conference in Bellevue, Washington, two of the utility's engineers explained why the utility was replacing the steam generators:

> Tubing
> The main reason to replace the existing steam generators is the OSG tubes are made of Alloy 600 material which is susceptible to intergranular attack (IGA) and stress corrosion cracking. The RSG tube material is thermally treated Alloy 690 (Alloy 690 TT). Alloy 690 TT has been under development since the early 1970s, and based on extensive industry-wide tests, bas been determined to be the material of choice for use in the replacement steam generators industry-wide. Both laboratory testing and operational experience have proven that Alloy 690 TT is much more resistant to IGA and stress corrosion cracking in both primary and secondary water environments than Alloy 600.

However, as explained in the subcontractor's root cause report, the new Alloy 690 conducted heat 10% below Alloy 600:

> The CDS specified Alloy 690TT tube material [], which has a thermal conductivity that is approximately 10% less than that of the OSG tube

material. In addition, the number of tubes had to be increased by 8% to accommodate future tube plugging [].[2]

The utility opted in favor of severe changes in the replacement steam generators design to keep the same power output. In other words, instead of accepting the tradeoff of a longer lasting steam generator that produced 10% less power, the utility decided to risk design changes to have both longer-lasting generators and the same power output:

> These factors led to the increase of the tube bundle heat transfer surface area from 105,000ft2 (OSG) to 116,100 ft2 (an 11% increase), an increase in the number of tubes from 9,350 (OSG) to 9,727 (RSG), and to the RSG tube bundle being taller than that of the OSG. [3]

The utility compounded the risks of its decision to change the design by limiting the correctives that evaded review by federal nuclear safety regulators:

> However, the AVB Design Team recognized that the design for the SONGS RSGs resulted in higher steam quality (void fraction) than previous designs and had considered making changes to the design to reduce the void fraction (e.g., using a larger downcomer, using larger flow slot design for the tube support plates, and even removing a TSP). But each of the considered changes had unacceptable consequences and the AVB Design Team agreed not to implement them. Among the difficulties associated with the potential changes was the possibility that making them could impede the ability to justify the RSG design under the provisions of 10 C.F.R. §50.59.

In June 2013, a United States Senator obtained and released an internal utility letter showing the utility was fully aware of the risks it was taking back in November 2004:

> This will be one of the largest steam generators ever built for the United States and represents a significant increase in size from those that [the subcontractor] has built in the past. It will require [the subcontractor] to evolve a new design beyond that which they currently have available.
> **
> ** I am concerned that there is the potential that design flaws could be inadvertently introduced into the steam generator design that will lead to

[2] https://www.nrc.gov/docs/ML1306/ML13065A097.pdf
[3] https://www.nrc.gov/docs/ML1306/ML13065A097.pdf

> unacceptable consequences (e.g., tube wear and eventually tube plugging). This would be a disastrous outcome for both of us and a result each of our companies desire to avoid.

The utility must see that its decision to rig the regulator's investigation amounted to obstruction of justice, and its perjury denied utility customers of due process. The utility worked with the ALJ to postpone the investigation into phases**,** e.g.:

> "Mr. Worden: I don't recall going beyond procedural matters, including broad concept of phases of testimony." (ALJ 5 December 2012 email to utility Vice President)

> "The Commission intends to approach this inquiry in stages." (ALJ 10 December 2012 Ruling)

While the investigation was stalled, the regulator's president met with the utility's Vice President for External Affairs in Warsaw, Poland to kill the investigation and make utility customers pay:

> "1. Pre-RSG Investment: recover w/debit-level return through 2022." (26 March 2013 CPUC President Warsaw deal point)

> "3. Replacement power responsibility: customer."
> (26 March 2013 CPUC President Warsaw deal point)

> 9. Process
> a) settlement agreement approved in OII
> b) balance of OII closed except for shutdown O&M phase." (26 March 2013 CPUC President and the Utility's Executive VP External Relations. Warsaw deal points)

When a utility letter was released to the public showing the utility knew of the very risks that ultimately caused the steam generators to fail -- prompting a United States Senator to call for a criminal investigation -- the utility and regulator implemented the deal.

> "We need to talk with Pickett ASAP to let him know about your discussions with Peevey. Time is running out." (29 May 2013 email from Utility's Senior Vice President Regulatory Policy & Affairs to

Utility's Managing Director, State Energy Regulation)

> "We have a small window of opportunity to work with parties to implement a shutdown in exchange for getting our money back. That window will close soon and we will lose a very good opportunity." (29 May 2013 email from Utility's Managing Director, State Energy Regulation to Utility's Senior Vice President Regulatory Policy & Affairs)

> "A preliminary review of our records suggests the letters referenced by [the] Senator were not provided by [the utility] either to the [regulator] itself or to the parties participating in our investigation into the [nuclear plant]."

As stated, **the utility** has admitted the steam generators were defectively designed. Whether this was because of the subcontractor or the utility or both does not relieve the utility of respondent superior responsibility for the resulting damage. Was it acting in good faith when the utility tried to evade responsibility by claiming it was defrauded into deploying the defective steam generators? The utility was unable to show the arbitrators that the subcontractor's "misrepresentation or nondisclosure was 'an immediate cause' of the [utility's] injury-producing conduct." See, *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009) Given this failure of proof, can the utility now be heard that it "reasonably relied on MHI's assurance that its design of the replacement steam generators ("RSGs") was safe and reliable?"

Missing from the CPUC Decision approving the settlement was an analysis of the "the strength of the plaintiffs' case and the amount offered in settlement." *Ruiqi Ye v. Sephora USA, Inc.*, 2017 U.S. Dist. LEXIS 82343, *3 (N.D. Cal. 2017)

The utility claims customers will do worse if the case is resolved in an honest forum. Implicit in this argument is the question of whether the CPUC could be trusted to return a decision more favorable to customers. The utility's prediction of future litigation success should be evaluated in light of its erroneous prediction that it would recover over $5

billion from its subcontractor, MHI, in the arbitration. If we learn anything from the arbitration, it is that the utility is not likely to prevail in an honest forum. There remains a cloud over the CPUC, a question mark about whether it has recovered its due process footing. After all, "the primary purpose of the Public Utilities Act is to insure the public adequate service at reasonable rates without discrimination; and the commission has the power to prevent a utility from passing on to the ratepayers unreasonable costs for materials and services by disallowing expenditures that the commission finds unreasonable. *San Francisco v. Public Utilities Com.* (1971) 6 Cal. 3d 119, 126.

III.

SCE ARBITRATION FRAUD CLAIM

SCE claimed in its arbitration with Mitsubishi Heavy Industries (MHI) that MHI was responsible for "critical defects that forced [San Onofre power plant] into premature retirement on June 7, 2013, causing billions of dollars in harm to the [San Onofre's] Owners." (SCE Demand for Arbitration Demand" "p. 1) SCE proclaimed it was a victim of MHI's fraud:

> 124. ** Mitsubishi made false statements of material fact and failed to disclose material facts necessary to prevent its statements to Edison from being misleading. Mitsubishi acted recklessly (or worse) and without regard for the truth in making these false, misleading, and/or incomplete statements, and Mitsubishi did so with the intent to induce Edison to rely upon its false and misleading statements.
>
> 125. As detailed in Paragraphs 31 and 36 above, prior to entering the Contract with Mitsubishi, Edison considered numerous other vendors to design and manufacture the RSGs. As a result of Mitsubishi's misrepresentations, Edison was induced to enter the Contract with Mitsubishi and thereby lost the opportunity to select a different company that could have properly designed and manufactured the RSGs.

126. As detailed in Paragraph 48 above, after formation of the Contract, Mitsubishi made numerous assurances to Edison that the RSG design was adequate to prevent damaging tube vibration. Mitsubishi also assured Edison that it was properly analyzing the thermalhydraulic conditions in the RSGs, without disclosing that its proprietary modeling software contained embedded errors and Mitsubishi was using that software outside of its validated range. These and similar statements, which were made recklessly and without regard for their truth, led Edison to believe that Mitsubishi could and would adequately control and prevent damaging tube vibration and wear, and that Mitsubishi had designed and fabricated the RSGs in accordance with the Contract. As a result, Edison accepted and installed the RSGs, thereby losing the opportunity to reject the RSGs or to resolve any defects with the RSGs prior to installation in order to prevent the problems that occurred once the RSGs were put into service.

127. In justifiable reliance on Mitsubishi's false, misleading, and/or incomplete statements, which were made recklessly and without regard for their truth, Claimants have suffered damages of not less than $4 billion.

128. The damages incurred by Claimants as a result of Mitsubishi's misrepresentations stem from Mitsubishi's breach of a legal duty independent of the Contract. Accordingly, the provisions governing the limitation of liability under the Contract do not apply to Mitsubishi's fraud. Moreover, fraud constitutes an exception to the limitations on liability reflected in the Contract. Accordingly, Claimants are entitled to all damages resulting from Mitsubishi's misrepresentations.

IV.

ARBITRATION TRIBUNAL DECISION

ON FRAUD CLAIM

In order to prevail on any of its fraud claims, SCE had to prove that MHI made one or more false representations. SCE's purported evidence showing that MHI's statements were false consisted of five documents and a single witness. The arbitration Tribunal found "none of this evidence proves that [MHI] statements were false." (Tribunal, p. 871, ¶ 2414)

At the arbitration hearing, SCE only presented one witness, Mr. Wharton, to testify to the pre-contractual time period. His basic testimony was that Edison

had concerns that MHI had never designed a steam generator the size of those at San Onofre, but that SCE "got comfortable" with MHI because of representations that MHI knew how to address important design issues. (Tribunal p. 871, ¶2414)

On cross-examination, Mr. Wharton admitted that he was not involved in the technical negotiations and had no personal knowledge of which statements in MHI's proposal SCE relied upon in choosing MHI as the designer and manufacturer of the steam generators. The Tribunal concluded "Because [SCE] [did] not put forth credible evidence to show that [MHI's] pre-contractual statements were misrepresentations." (Tribunal p. 871, ¶2414)

V.
SCE SHOULD TAKE NO MORE FRUIT FROM THE POISONOUS SAN ONOFRE TREE

The CPUC may not know enough to decide exactly how much SCE should, or should not, receive for the closed San Onofre plant. However, the CPUC *does* know enough to stop future rates based on San Onofre revenue requirements.

A. San Onofre Decision Based on Due Process Violations

The then-CPUC President engaged in a pattern of ex parte communications in order to arrive at the settlement agreement under which SCE computes San Onofre revenue requirements. One of the primary purposes of restrictions on ex parte contacts with decision-makers is to prevent a party from gaining an unfair advantage in a contested matter. See, *Portland Audubon Society v. Endangered Species Committee,* 984 F.2d 1534, 1543 (9th Cir. 1993)

By not being subject to the adversarial process, ex parte contacts violate the right to a fair hearing. C. Wolfram, Modern Legal Ethics § 11.3 ("Such contacts violate the right of every party to a fair hearing, a corollary of which is the right to hear all evidence and argument offered by an adversary. The violation is particularly acute because the calculated secretiveness of such communications strongly suggests their inaccuracy.");

See, John Allen, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 Utah Law Rev. 1135, 1197 (1993) ("Unchallenged evidence or arguments are more salient, more likely to be recalled by the decision maker, and more likely to carry inordinate weight in the mental process of reaching a final conclusion.")

Improper ex parte communications have been referred to as fraud by the court, because they interfere with the decision-maker's ability to make a fair decision. *See*, e.g., *State ex. Rel. Corbin v. Arizona Corp. Com'n,* 143 Ariz. 219 (1984). As one court summarized: "a party's right to due process is violated when the agency decision-maker improperly allows ex parte communications from one of the parties to the controversy." *State ex. Rel. Corbin v. Arizona Corp. Com'n*, 143 Ariz. 219 (1984)

Allowing ex parte contacts can essentially nullify the public's right to attend and participate in agency decisions. As the Ninth Circuit observed:

> The public's right to attend all Committee meetings, participate in all Committee hearings, and have access to all Committee records would be effectively nullified if the Committee were permitted to base its decisions on the private conversations and secret talking points and arguments to which the public and the participating parties have no access. *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1542 (9th Cir. 1993) (*citing United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 539 (D.C. Cir. 1978).

The ex parte meeting in Warsaw, where according to SCE's admission the "framework" of the settlement was discussed, was one in which the public did not attend and participate. This settlement, according to the Ninth Circuit, effectively nullifies the public's right to attend. The Warsaw settlement framework is the exact type of secret talking points criticized by the Ninth Circuit.

The D.C. Circuit has further stated that ex parte contacts make a "mockery of justice:"

> We think it is a mockery of justice to even suggest that judges or other decision-makers may be properly approached on the merits of a case during the pendency of an adjudication. Administrative and judicial adjudication are viable only so long as the integrity of the decision making process remains inviolate. There would be no way to protect the sanctity of the adjudicatory process if we were to condone direct attempts to influence decision-makers through ex parte contacts. *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.,* 685 F.2d 547, 570 (D.C. Cir. 1982).

In addition to issues of general fairness and possible taint of the decision, ex parte contacts can also damage the "integrity of the decision making process itself, and the public's perception of the process." *Re Contacts Between Public Utilities and Former Commissioners*, 82 P.U.R.4th 559, 1987 WL 257598 (Minn. P.U.C. 1987). Such ex parte discussions also offend the Bagley-Keene open meeting law and the California State Constitution's Article 1 § 3 which provides:

> The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

On the record before the CPUC, the CPUC order requiring utility customers to pay SCE $3.3 billion cannot be said, as a matter of law, to have provided utility customers reasonable notice and hearing. While the CPUC reopened the closed proceedings in light of the serious ex parte violations, the collection of rates from ratepayers continues.

VI.

PRECEDENT FOR DENYING COSTS

Where costs are deemed unreasonable, the Commission may – and has – denied cost recovery to the utility. Two examples are the Mohave Generating Station 1985 Accident and the Helms Pumped Storage Project. *See* D.94-03-048, 53 CPUC 2d 452,

456 (holding that it is not reasonable to pass on to Southern California Edison ratepayers costs resulting from the Mohave Coal Plant accident); D.85-08-102, 18 CPUC 2d 700, 715-716 (holding that ratepayers are not responsible for bearing the consequences of PG&E's imprudence with respect to the Helms Pumped Storage Project).

The Mohave Power Station (known also as Mohave Generating Station, or MOGS)[4] was a 1,580-megawatt coal-fired power plant located in Laughlin, Nevada, first activated in 1971. Southern California Edison was the majority owner of the plant (56%) and was its operator. In 1985, a weld in a high-pressure 30 inch diameter steam pipe ruptured, blasting steam through a six foot by 20 foot breech, hotter than 1,000 degrees Fahrenheit into an employee lunch room and the plant's control room. As a result, six people were killed and ten other people were seriously injured. The steam caused extensive damage to the control room, as well as other portions of the plant.

In the Commission's review of this accident[5], there was ample evidence that SCE acted unreasonably and imprudently by using 1955 standards for the thickness of the pipes instead of the more recent and available 1967 standards and operating the plant consistently at higher pressures and temperatures than was specified as safe, among other things. The Commission ruled that: 1) Costs stemming from the 1985 hot reheat pipe rupture in Unit 2 of the Mohave generating station were unreasonable and not to be included in rates, and 2) unreasonable costs resulting from the accident were disallowed, including those costs in excess of what the company would have incurred, had Edison followed a reasonable reheat pipe inspection program and taken the necessary steps to correct weld and metal fatigue problems, including necessary power purchases while the plant was shut down for repairs.

Most importantly, the Commission found that in a case when the actions of the SCE were deemed unreasonable and imprudent, all costs stemming from the accident

were not included in rates, including only those costs that would have been incurred had Edison followed appropriate and reasonable programs to inspect and correct any potential failures.

The Helms case is an important comparison to the SONGS case, because it includes a failed engineering project and the utility sued its contractors and suppliers. The Helms Pumped Storage Plant is located 50 mi (80 km) east of Fresno, California in the Sierra Nevada Mountain Range's Sierra National Forest. It is a power station that uses Helms Creek and the pumped-storage hydroelectric method to generate electricity. After being planned in the early 1970s, construction on the plant began in June 1977 and commercial operations began on 30 June 1984. It has an installed capacity of 1,212 MW and is owned by PG&E.

Part of the project -- the "Lost Canyon Crossing" --- had to be reconstructed for $240 million. In the Decision No. D.85-08-102 by the CPUC on the "Lost Canyon Crossing", the Commission found as to the expenditures:

> ... Under these circumstances, we would only note that PG&E should not look to ratepayers in the first instance to bear any portion of the Lost Canyon reconstruction costs. If any of these costs are not recouped by PG&E from either its contractor or U.S. Steel, PG&E will bear a heavy burden of proof in any subsequent application related to such costs to establish that ratepayers are not being required to indemnify PG&E for losses arising from its own negligence or the negligence of its contractor or project subcontractors. Ratepayers are not responsible for bearing the consequences of negligence.
>
> ***
>
> Further, we note that ratepayers lost the considerable capacity benefits which Helms adds to PG&E's resources. Should PG&E file any application to recoup Lost Canyon-related expenditures, we intend to consider an offset to revenues to reflect the lost or deferred capacity benefits resulting from the delay of commercial operations at Helms.

Here, the utility's actions relating to the replacement steam generators are unreasonable and imprudent. As such, the costs that result from their failure should not be

borne by ratepayers, and collection should not be permitted through the filing of any future Advice Letters.

VII.

CONCLUSION

All charges demanded or received by any public utility for any commodity furnished must be just and reasonable. *Pub. Util. Code §* 451. No public utility can change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except on a showing before the PUC and a finding by the PUC that the new rate is justified. Pub. Util. Code § 454(a). Here, there has been no showing that the rates were justified. Yet, the utility has collected and continues to collect rates as if they were. The arbitration decision makes clear that SCE was not defrauded; SCE must own its decisions. Collection based on plant revenue requirement must not continue.

Accordingly, Petitioners request the CPUC order that collecting from ratepayers based on revenue requirements must not be further permitted, such that no future Advice Letters (or other mechanism) seeking revenue requirement from San Onofre may be filed.

Respectfully Submitted,

Dated: June 19, 2017

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